82-187

No. 82 –

Office - Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1982

FRANK LUJAN, PETITIONER

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR
JAMES G. WATT, SECRETARY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE UNITED STATES DISTRICT COURT DENIED PETITIONER DUE PROCESS OF LAW BY REFUSING JURISDICTION PURSUANT TO 28 U.S.C. §1331(a).

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 2

EXTENSION OF TIME 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 3

1. THE DECISION BELOW IS DIRECTLY IN CONFLICT WITH THIS COURT'S RULINGS ON 28 U.S.C. §1331, SIGNIFICANTLY UNDERCUTS PETITIONER'S FIFTH AMENDMENT RIGHT TO NOT BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND REACHES A PROCEDURAL DUE PROCESS QUESTION NEVER PREVIOUSLY DECIDED BY THIS COURT.

CONCLUSION 7

APPENDIX

TABLE OF AUTHORITIES

PAGE

Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604, 56 L. Ed. 2d 570, 98 S.Ct. 2002 (1978) 5

Baker v. United States, 613 F.2d 224 (9th Cir. 1980) cert. den. 449 U.S. 932, 66 L.Ed.2d 157, 101 S.Ct. 332 (1980) 5

Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) 5

Ben Realty v. Gothberg, 56 Wyo. 294, 109 P.2d 455 (1941) 6

Califano v. Sanders, 430 U.S. 99, 51 L.Ed.2d 192, 97 S.Ct. 980 (1977) 4

Doria Mining and Eng. Corp. v. Morton, 608 F.2d 1255 (9th Cir. 1979) 5

Duke Power Co. v. Caroline Env. Study Gp., 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1979) 4

Frank Lujan, 30 IBLA 95 (1977) 3, 6

Frank Lujan, 40 IBLA 186 (1979) 3, 4

Galt v. Willingham, 11 F.2d 757 (C.C.A.Fla. 1926) 6

George Whitaker, 32 L.D. 329 (1903) 7

Gorman v. Army and Air Force Exchange Service, 619 F.2d 1141 (5th Cir. 1980) 5

Henry Woodruff, 24 IBLA 190 (1976) 7

Laden v. Andrus, 595 F.2d 482 (9th Cir. 1979) 5

Mir v. Fosburg, 646 F.2d 342 (9th Cir. 1980) 5

Nina R.B. Levinson, 1 IBLA 252, 256 (1971) 7

Parkview Corp. v. Dept. of Army, Etc., 490 F. Supp. 1278 (E.D. Wis. 1980) 5

Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132 (5th Cir. 1980) 5
Spawr v. Johnson, 49 Kans. 788, 31 P.664 (1892) 7
Trustees v. Toffel, 145 So. 2d 737 (Fla. App. 1962) 6
Vaught v. McClymond, 116 Mont. 542, 155 P.2d 612 (1945) .. 6

CONSTITUTIONAL AND STATUTORY AUTHORITIES:

28 U.S.C. §1254(1) 2
28 U.S.C. §1331 ..... 3, 4, 5, 8
43 U.S.C. §§752 and 772 ..... 1, 3, 5, 6, 7
Rule 17 — Rules of the Supreme Court of the United States ... 5
Manual of Instructions for the Survey of the Public Lands of the United States, 1947 ..... 3, 4, 6, 7

In the Supreme Court of the United States

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FRANK LUJAN, PETITIONER

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UNITED STATES DEPARTMENT OF THE INTERIOR
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Frank Lujan, by and through his attorney, William A. L'Esperance, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit affirming the lower court dismissal of his complaint in the District Court for the District of New Mexico. The Bureau of Land Management wrongfully applied its own regulations and procedures to a "dependent resurvey" of certain land affecting the rights of Petitioner in violation of 43 U.S.C. §§752 and 772.

OPINION BELOW

The slip opinion of the United States Court of Appeals for the Tenth Circuit, filed March 29, 1982, affirming the Memorandum opinion of the District Court for the District of New Mexico dismissing the complaint of Petitioner, is set forth herein as Appendix A.

EXTENSION OF TIME

Justice White by letter order, No. A1098, 19 June, 1982, extended the time for filing this Petition until July 27, 1982.

JURISDICTION

The Opinion and Order appealed from was filed March 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On June 2, 1970, the New Mexico Director of the Bureau of Land Management directed a "dependent resurvey" of certain lands, including portions of Petitioner's lands, pursuant to 43 U.S.C. §§752 and 772, and the Manual of Surveying Instructions, 1947 (hereinafter, the Manual).

The resurvey, conducted in the summer of 1970, changed the accepted boundary of Petitioner's land and he protested. The Interior Board of Land Appeals granted Petitioner a hearing but required Petitioner to demonstrate the incorrectness of the resurvey. 30 IBLA 95 (1977).

The rehearing found the resurvey to be in sufficient compliance with the Manual and IBLA hearing precedent. 40 IBLA 186 (1979). It is from this decision that Petitioner complained in United States District Court for the District of New Mexico.

The government moved to dismiss the complaint and the District Court, viewing this matter as a mere boundary dispute, despite the pleading of 28 U.S.C. §1331, dismissed for want of a federal question.

The Court of Appeals for the Tenth Circuit affirmed on different grounds, citing equitable estoppel, similarly viewing the situation as a mere boundary dispute.

Petitioner herein argues that the District Court had jurisdiction under 28 U.S.C. §1331 to review the Bureau of Land Management's application of 43 U.S.C. §§752 and 772, as well as its own procedure; that the matter is significant and far reaching, and has nothing to do with equitable estoppel; and that a fundamental procedural due process issue exists regarding Petitioner's severe burden of proof as misapplied by the governmental agency in question.

REASONS FOR GRANTING THE WRIT

There are two big things wrong with the decision below (see Appendix A) — (1) the Tenth Circuit is out of line with all other jurisdictions on its interpretation of 28 U.S.C. §1331 and (2) the Bureau of Land Management (BLM) has never had a serious review of its erroneous extrapolation of an internal 1903 dicta-principle regarding burden of proof.

Mr. Lujan has had family patent rights to the area in question since 1880. His amended complaint seeks review of the administrative decision in 40 IBLA 186 (1979) pursuant, among other things, to 28 U.S.C. §1331. He alleges that as a direct and proximate result of BLM's decision making process, he has suffered and continues to suffer real damages to his property rights as secured by the Constitution and Laws of the United States of America.

The District Court opinion begs the federal review question by stating that the resurvey was conducted pursuant to the Manual. How does it know this absent a hearing? The Court went on to cite *Califano v. Sanders*, 430 U.S. 99, 51 L.Ed.2d 192, 97 S.Ct. 980 (1977), to the effect that the Administrative Procedures Act alone does not grant subject matter jurisdiction. The Court avoided or never found *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 56 L.Ed.2d 570, 98 S.Ct. 2002 (1978), which was clearly pled and argued by Petitioner to both the District Court and the Court of Appeals.

The Court of Appeals avoided this jurisdictional question by bringing in collateral estoppel. But the situation here is not, as the government suggested to Denver, a boundary dispute, but is a serious petition for review of an agency's interpretation of its own rules and regulations. The Petitioner has exhausted his administrative remedies and now seeks timely review of the agency's acts, particularly whether the BLM followed proper procedure on whether the resurvey should be rejected.

Jurisdiction to review a decision of the BLM is clearly conferred by 28 U.S.C. §1331(a). *Andrus v. Charlestone Stone Prod. Co.*, supra.

There are no published Tenth Circuit cases on point. This Court has followed *Charlestone Stone Products* in *Duke Power Co. v. Caroline Env. Study Gp.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1979).

Three other Circuits contain cases diametrically opposed to the decision on jurisdiction to review below:

NINTH:

Doria Mining and Eng. Corp. v. Morton, 608 F.2d 1255 (9th Cir. 1979).

Baker v. United States, 613 F.2d 224 (9th Cir. 1980) cert. den. 449 U.S. 932, 66 L.Ed.2d 157, 101 S.Ct. 332 (1980).

Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

Mir v. Fosburg, 646 F.2d 342 (9th Cir. 1980).

Laden v. Andrus, 595 F.2d 482 (9th Cir. 1979).

FIFTH:

Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132 (5th Cir. 1980).

Gorman v. Army and Air Force Exchange Service, 619 F.2d 1141 (5th Cir. 1980).

SEVENTH:

Parkview Corp. v. Dept. of Army, Etc., 490 F. Supp. 1278 (E.D. Wis. 1980).

Pursuant to Rule 17(a) and (c), Rules of the Supreme Court of the United States, the Writ should issue and briefs ought to be submitted. The above conflict in 28 U.S.C. §1331(a) is the principal reason — the Tenth Circuit has attempted herein to avoid following *Charlestone Stone Products* and the reasoning

of all the other courts which have confronted this issue.

Not only is this case in open conflict with the reasoning of this Court and several other jurisdictions, but also the Tenth Circuit has failed to review an agency which is engaged in a pattern of frustrating procedural due process. (Rule 17(c), Rules of the Supreme Court).

The BLM is permitted by 43 U.S.C. §§752 and 772 to conduct resurveys where public land is invvolved — Petitioner assumes the validity of the purpose of the resurvey in question; it really makes no difference if the BLM simply resurveys, it is the "retracement and restoration" of markers which has led to difficulties. These statutes require the agency not to execute the resurvey so as to impair any rights of owners of lands affected, as here, by any such resurvey. (A "dependent" resurvey may not survey anew, but is limited in its function to retracement of the old patent survey. Manual §§409-427, see especially §419).

The flavor of the Manual and the statutes, above, is that when, as here, the agency resurveys public lands, the question is not where would an entirely accurate survey locate the lines, but where *did* the *original* survey locate lines. See *Trustees v. Toffel*, 145 So. 2d 737 (Fla. App. 1962), and *Ben Realty v. Gothberg*, 56 Wyo. 294, 109 P.2d 455 (1941). Jurisdiction, therefore, lies with the federal court precisely because a new resurvey was made, the results were *ultra vires* and damaging to Petitioner, and the statutes and regulations in the Manual were violated.

After the government issued a valid patent in 1880 and *that* survey accurately disposed of the land that has since belonged to Petitioner's family, the government had no jurisdiction to affect Lujan's rights by "restoration" in a new survey. 43 U.S.C. §752. A "dependent resurvey", as opposed to an "independent resurvey", follows the footsteps of the original surveyors and it is *immaterial* whether the lines run by him are correct. *Galt v. Willingham*, 11 F.2d 757 (C.C.A.Fla. 1926); *Vaught v. McCly-*

mond, 116 Mont. 542, 155 P.2d 612 (1945); see *Spawr v. Johnson*, 49 Kans. 788, 31 P.664 (1892).

The issue is not where the boundary is — what is agreed *is* the boundary— but rather whether the 1970 BLM dependent resurvey should be accepted as the official record of survey or rejected.

The BLM ought not to be allowed without review to tell patent-holders where their land is — the BLM thereby gives adjacent landholders a cause of action by interfering in an established patent!

The reason why Petitioner could not adequately demonstrate this misapplication of the statutes and regulations, above, through the administrative hearing process, and the substantive reason why the Writ should issue, is that Petitioner has been required since 30 IBLA 95 (1977) to refute the 1970 resurvey by *clear and convincing* evidence. Humpty-Dumpty has been turned on his head and the patent-holder, whose land has been resurveyed out from under him, has been shackled with the procedurally unfair burden of showing that he can rebut a powerful presumption of correctness attached to the BLM's resurvey by age, rather than by law or judicial interpretation. The fox has been left to guard the chickens.

The statute says that the government should start from where things *are*, on the ground, and not make lines and move 90 years of accepted patent ownership. 43 U.S.C. §§752, 772. Manual, supra, §409.

The presumption of government survey correctness leading to Petitioner's excessive burden of proof appears in no statute or regulation. It is a creature of internal IBLA adjudication. See *Henry Woodruff*, 24 IBLA 190 (1976) and *Nine R.B. Levinson*, 1 IBLA 252, 256 (1971). The source appears to be a misinterpretation of *George Whitaker*, 32 L.D. 329 (1903), where a

survey was *approved* and *after a long time* it appeared some land had been omitted from the survey. It made sense, in that contest, to require a higher standard of proof for a petitioner.

But here the 1970 survey has never been *accepted*! So, even accepting the sense of the agency's presumption, its rule does not apply and in the instant case the *government* ought to be required to prove it followed its own statutes and regulations. Needless to say, Petitioner provided a substantial amount of proof to this effect in the 1979 hearing, and plenty of doubt about the 1970 resurvey was raised — only the wrongful and excessive burden of proof prevented Mr. Lujan from winning below.

The BLM ought to bear the burden of showing the gross inaccuracy of the original 1880 survey, not the other way around. The agency has never demonstrated that the 1880 plat is fraudulent or grossly in error. The government should not be allowed to conduct a patently erroneous resurvey, which result in a neighbor gleefully filing an ejectment action, then wash its hands of the matter by imposing an outrageous standard of proof upon the patent-holder.

CONCLUSION

The BLM resurveyed Petitioner Frank Lujan's land, the resurvey was never accepted, the IBLA required Petitioner to meet a clear and convincing evidence standard which is an erroneous application of an internal 1903 decision, the BLM did not follow 43 U.S.C. §§752 and 772 or its own Manual, the District Court declined jurisdiction to review the IBLA by misreading this case as a boundary dispute and failing to apply 28 U.S.C. §1331 to Petitioner's Constitutional right to procedural due process. The Tenth Circuit perpetuated the misreading by failing to see this as a matter of agency review

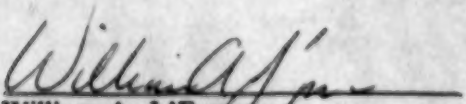
and failing to apply 28 U.S.C. §1331.

The difficulty throughout this case has been caused by the misapplication of the burden of proof. This Court is urged to grant its Writ to

(1) put the Tenth Circuit in line with *all* other 28 U.S.C. §1331 decisions, and

(2) to change the burden of going forward with the evidence to the BLM and remand this cause to the District Court for a review of whether the BLM should be prohibited from accepting the 1970 resurvey.

Respectfully submitted



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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-1291

FILED
United States Court of Appeals
Tenth Circuit
MAR 29 1982
HOWARD K. PHILLIPS
Clerk

FRANK LUJAN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal from the United States
	)	District Court for the
UNITED STATES DEPARTMENT	)	District of New Mexico
OF THE INTERIOR and	)	(D.C. No. 79-0455)
JAMES G. WATT, Secretary,	)	
	)	
Defendants-Appellees.	)	

Jose A. Sandoval, Espanola, New Mexico (Bill Piatt, Santa Fe, New Mexico, with him on the brief), for Plaintiff-Appellant.

Robert D. Clark (and Robert L. Klarquist, Attorneys, Department of Justice, Washington, D.C.; Carol E. Dinkins, Assistant Attorney General; Don V. Svet, United States Attorney, and Raymond Hamilton, Assistant United States Attorney, Albuquerque, New Mexico, with him on the brief), for Defendants-Appellees.

Before McWILLIAMS, McKAY, and SEYMOUR, Circuit Judges.

McWILLIAMS, Circuit Judge.

On June 5, 1979, Frank Lujan, the appellant, instituted the present proceeding in the United States District Court for the District of New Mexico, against the United States Department of the Interior, its Secretary, and the United States. By amended complaint, Lujan challenged a decision of the Interior Board of Land Appeals (IBLA) and, in connection therewith, sought a trial de novo. The decision thus challenged appears as Frank Lujan, 40 IBLA 184 (1979).

The defendants filed a motion to dismiss, which was granted, and the district court entered judgment dismissing the action on the ground that it lacked subject matter jurisdiction. The district court determined that the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976), does not contain an implied grant of subject matter jurisdiction to federal courts to hear all appeals of administrative decisions.[1] Thus, the district court reasoned, jurisdiction was dependent upon whether the complaint raised a federal question. Finding that the gravamen of the complaint was title to real property located in the State of New Mexico and that no violation of Lujan's rights as secured by federal statute or by the

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[1] On appeal, Lujan appears to have abandoned his original claim that the APA authorized judicial review of the Secretary's decision in this case. In any event, we have determined previously that the APA is not an independent grant of federal jurisdiction. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980), aff'd on other grounds, 50 U.S.L.W. 4169 (1982). Accord, Califano v. Sanders, 430 U.S. 99, 105-07 (1977).

federal constitution had occurred, the trial court found that no federal question was presented.[2] In his memorandum opinion, the trial judge also stated that even if subject matter jurisdiction existed, he would "refrain" from proceeding further in the matter and "defer" to a state court proceeding previously instituted, which involved the same matter Lujan sought to litigate in federal court.[3] Lujan v. United States Dep't of the Interior, No. CIV-79-455C (D. N.M. Feb. 11, 1980). Lujan appeals from the judgment dismissing his cause of action. Some background facts are essential to an understanding of the matter.

Frank Lujan and Michael Martinez, both farmers and ranchers, are abutting property owners in San Miguel County, State of New Mexico, and there has been a long-standing dispute as to the proper location of their common boundary line. In 1954, Martinez' predecessor-in-interest, Manuel Gallegos, brought a quiet title action against Lujan seeking to quiet title to the tract of land here involved. In that action Lujan filed a disclaimer, and judgment quieting title in Gallegos was entered. Gallegos v. Lujan, No. 15154

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[2]Because of our dismissal of this appeal, we need not address the merits of the district court's determination that it lacked subject matter jurisdiction under 28 U.S.C. § 1331 (1976).

[3]Although abstention from the exercise of federal jurisdiction is the exception and not the rule, Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 813 (1976); Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir.), cert. denied, 444 U.S. 931 (1979), the Supreme Court has recognized the rule that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. Colorado River Water Conserv. Dist. v. United States, 424 U.S. at 818; Donovan v. City of Dallas, 377 U.S. 408, 412 (1964).

(San Miguel County Dist. Ct. Mar. 31, 1954).

In 1970, the Bureau of Land Management (BLM) conducted a resurvey of certain federal land lying to the west of the contiguous tracts of land owned by Lujan and Gallegos, such public land, however, abutting neither tract. The stated purpose of the BLM's resurvey was to determine the boundaries of the public lands to the west of the Lujan and Gallegos properties in accordance with the original survey conducted by the United States in 1880. The 1970 resurvey was made pursuant to the provisions of 43 U.S.C. § 772 (1976). That statute provides, in relevant part, as follows:

> The Secretary of the Interior may . . . in his discretion cause to be made . . . such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of; Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

The BLM's 1970 resurvey did not result in any enlargement of federal land at the expense of either Lujan or Gallegos, who, as indicated, then owned the land later conveyed to Martinez. In the course of the resurvey, however, certain corner markers were relocated, and such relocation arguably affected the location of the boundary line between the Lujan tract and the Gallegos tract, to the end that Gallegos' acreage would be somewhat increased at the expense of Lujan.

In 1974, Martinez acquired the property to which Gallegos had quieted title in 1954. It appears that shortly thereafter a controversy arose between Martinez and Lujan as to the exact location of their common boundary. Martinez employed a private surveyor to determine the parameters of his land, and then, in 1976, Martinez brought an ejectment action against Lujan in a New Mexico state court. In that action, Martinez relied principally on the quiet title action brought by his predecessor-in-interest, Gallegos, and claimed that Lujan was occupying land title to which had been quieted in Gallegos.

In 1977, some seven years after the 1970 resurvey, and one year after Martinez brought an ejectment action against Lujan in the state court, Lujan sought, and obtained, a review of the 1970 resurvey in an administrative hearing in the Department of the Interior. Martinez was permitted to intervene in that proceeding. An administrative law judge (ALJ) held an evidentiary hearing on the matter on November 30 and December 1, 1977, and upheld the validity of the resurvey and the accuracy thereof. In April, 1979, the IBLA affirmed the ALJ. Frank Lujan, 40 IBLA 184 (1979). It was in this setting that Lujan, in June, 1979, instituted the present proceeding wherein he sought review of the IBLA's validation of the 1970 resurvey and a trial de novo to determine the accuracy thereof.

While Lujan's appeal from the federal district court's judgment of dismissal was pending in this Court, Martinez' state court

ejectment action against Lujan proceeded to a final disposition. The New Mexico state trial court granted Martinez' motion for summary judgment and enjoined Lujan from entering on to Martinez' land. Martinez v. Lujan, No. 21,677 (San Miguel County Dist. Ct. Nov. 25, 1980). On appeal, the New Mexico Supreme Court affirmed the summary judgment thus entered in favor of Martinez. Martinez v. Lujan, No. 13,521 (N.M. Oct. 26, 1981). Lujan did not seek review by the United States Supreme Court of the judgment of the New Mexico Supreme Court. It is in this posture that we now address the appeal.

By supplemental brief, the government asserts that the doctrine of res judicata precludes further consideration of the present appeal. In this regard, the government states that the only purpose of the proceeding in federal district court was to determine judicially the accuracy of the 1970 resurvey as such might affect the location of the common boundary between the Lujan and Martinez properties. That particular matter, argues the government, was considered in the ejectment action in state court. The state court ejectment action having now been finally determined, and the location of the common boundary line between Lujan and Martinez having been forever fixed, the government argues that such renders applicable the doctrine of res judicata. Lujan does not dispute the events which form the basis of the government's res judicata argument. Although res judicata is an affirmative defense and normally must be raised in the trial court, the peculiar facts of this case

and the interests of judicial economy suggest that we consider this argument on its merits. See Westwood Chemical Co. v. Kulich, 656 F.2d 1224, 1227-28 (6th Cir. 1981); Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980); Bennett v. Commissioner, 113 F.2d 837 (5th Cir. 1940).

Res judicata is sometimes used interchangeably with the doctrine of collateral estoppel.[4] The doctrine of collateral estoppel precludes relitigation of issues actually litigated and determined in a prior lawsuit. The doctrine may be applied even though the party asserting it was not a party in the prior case. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971). Therefore, in this case, the doctrine of collateral estoppel applies even though the defendants herein were not parties to the state court proceedings. The significant fact is that the party against whom estoppel is being asserted, Lujan, was accorded a full and fair opportunity to litigate in the state court proceeding the very issues which he now seeks to relitigate in the federal district

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[4] The terms "res judicata" and "collateral estoppel" apply to related but distinct doctrines. Under res judicata, parties to a final judgment or their privies are barred from bringing further claims based on the same cause of action. Montana v. United States, 440 U.S. 147, 153 (1979); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877). Under collateral estoppel, an actual and necessary determination of an issue by a court of competent jurisdiction is conclusive in subsequent cases based on a different cause of action but involving a party to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). The preclusion issue presented in this matter is more accurately a question of collateral estoppel.

court, namely, the accuracy of the 1970 BLM resurvey and the effect thereof, if any, on his common boundary line with Martinez. The location of that common boundary line now has been finally determined by the state court.

It should be noted that in the ejectment proceeding in the state trial court, Martinez established, by affidavits, a prima facie case supporting his ejectment action against Lujan. Martinez presented the 1934 decree quieting title to the disputed property in Martinez' predecessor-in-interest. He also presented Lujan's disclaimer of any rights to the property. Martinez also produced a private survey, which relied upon the relocated corners set by the BLM in 1970. This private survey supported his claims. It appears from the record that Lujan offered little, or nothing, to controvert the affidavits offered by Martinez. Specifically, Lujan filed no affidavits in support of his assertion in this Court that he had relied upon the pre-1970 boundaries. Further, in the state court proceeding, Lujan did not even plead 43 U.S.C. § 772 by way of defense,[5] nor did he raise as a defense the accuracy of the 1970

[5] In United States v. Reimann, 504 F.2d 135, 138-39 (10th Cir. 1974) and United States v. Doyle, 468 F.2d 633, 636 (10th Cir. 1972), we recognized that language of 43 U.S.C. § 772 prevents a federal resurvey from adversely affecting the established and recognized property rights of private landowners abutting the public lands. The New Mexico Supreme Court had recognized this principle even earlier. Ward v. Rodrigues, 88 P.2d 277 (N.M.), cert. denied, 307 U.S. 627 (1939). Lujan's failure to rely upon such precedents in the state court proceedings prevents his reliance upon them now. Lujan had an opportunity to present his case of good faith reliance upon the pre-1970 boundaries to both the state trial court and the

resurvey, though he had the opportunity to do so. Hence, this is not an instance, as suggested by counsel, where Lujan never had his day in court. Lujan did have his day in court and, apparently, he slept on whatever rights he had.

Appeal dismissed.

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3 (continued)

New Mexico Supreme Court. His failure to do so does not prevent the government defendants in this action from asserting collateral estoppel against him.

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UNITED STATES DEPARTMENT OF THE INTERIOR
JAMES G. WATT, SECRETARY, RESPONDENT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-1291

FRANK LUJAN, Plaintiff-Appellant, v. UNITED STATES DEPARTMENT OF THE INTERIOR and JAMES G. WATT, Secretary, Defendants-Appellees.	)	Appeal from the United States District Court for the District of New Mexico (D.C. No. 79-0455)

Jose A. Sandoval, Espanola, New Mexico (Bill Piatt, Santa Fe, New Mexico, with him on the brief), for Plaintiff-Appellant.

Robert D. Clark (and Robert L. Klarquist, Attorneys, Department of Justice, Washington, D.C.; Carol E. Dinkins, Assistant Attorney General; Don V. Svet, United States Attorney, and Raymond Hamilton, Assistant United States Attorney, Albuquerque, New Mexico, with him on the brief), for Defendants-Appellees.

Before McWILLIAMS, McKAY, and SEYMOUR, Circuit Judges.

McWILLIAMS, Circuit Judge.

- Appendix A -

On June 5, 1979, Frank Lujan, the appellant, instituted the present proceeding in the United States District Court for the District of New Mexico, against the United States Department of the Interior, its Secretary, and the United States. By amended complaint, Lujan challenged a decision of the Interior Board of Land Appeals (IBLA) and, in connection therewith, sought a trial de novo. The decision thus challenged appears as Frank Lujan, 40 IBLA 184 (1979).

The defendants filed a motion to dismiss, which was granted, and the district court entered judgment dismissing the action on the ground that it lacked subject matter jurisdiction. The district court determined that the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976), does not contain an implied grant of subject matter jurisdiction to federal courts to hear all appeals of administrative decisions.[1] Thus, the district court reasoned, jurisdiction was

dependent upon whether the complaint raised a federal question. Finding that the gravamen of the complaint was title to real property located in the State of New Mexico and that no violation of Lujan's rights as secured by federal statute or by the federal constitution had occurred, the trial court found that no federal question was presented.[2] In his memorandum opinion, the trial judge also stated that even if subject matter jurisdiction existed, he would "refrain" from proceeding further in the matter and "defer" to a state court proceeding previously instituted, which involved the same matter Lujan sought to litigate in federal court.[3] Lujan v. United States Dep't of the Interior, No. CIV-79-455C (D. N.M. Feb. 11, 1980). Lujan appeals from the judgment dismissing his cause of action. Some background facts are essential to an understanding of the matter.

Frank Lujan and Michael Martinez, both farmers and ranchers, are abutting property

owners in San Miguel County, State of New Mexico, and there has been a long-standing dispute as to the proper location of their common boundary line. In 1954, Martinez' predecessor-in-interest, Manual Gallegos, brought a quiet title action against Lujan seeking to quiet title to the tract of land here involved. In that action Lujan filed a disclaimer, and judgment quieting title in Gallegos was entered. Gallegos v. Lujan, No. 15154 (San Miguel County Dis. Ct. Mar. 31, 1954).

In 1970, the Bureau of Land Management (BLM) conducted a resurvey of certain federal land lying to the west of the contiguous tracts of land owned by Lujan and Gallegos, such public land, however, abutting neither tract. The states purpose of the BLM's re-survey was to determine the boundaries of the public lands to the west of the Lujan and Gallegos properties in accordance with the original survey conducted by the United

States in 1880. The 1970 resurvey was made pursuant to the provisions of 43 U.S.C. § 772 (1976). That statute provides, in relevant part, as follows:

> The Secretary of the Interior may . . . in his discretion cause to be made . . . such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of; Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

The BLM's 1970 resurvey did not result in any enlargment of federal land at the expense of either Lujan or Gallegos, who, as indicated, then owned the land later conveyed to Martinez. In the course of the resurvey, however, certain corner markers were relocated, and such relocation arguably affected the location of the boundary line between the Lujan tract and the Gallegos tract, to the end that Gallegos'

acreage would be somewhat increased at the expense of Lujan.

In 1974, Martinez acquired the property to which Gallegos had quieted title in 1954. It appears that shortly thereafter a controversy arose between Martinez and Lujan as to the exact location of their common boundary. Martinez employed a private surveyor to determine the parameters of his land, and then, in 1976, Martinez brought an ejectment action against Lujan in a New Mexico state court. In that action, Martinez relied principally on the quiet title action brought by his predecessor-in-interest, Gallegos, and claimed that Lujan was occupying land title to which had been quieted in Gallegos.

In 1977, some seven years after the 1970 resurvey, and one year after Martinez brought an ejectment action against Lujan in the state court, Lujan sought, and obtained, a review of the 1970 resurvey in an administrative hearing in the Department of

the Interior. Martinez was permitted to intervene in that proceeding. An administrative law judge (ALJ) held an evidentiary hearing on the matter on November 30 and December 1, 1977, and upheld the validity of the resurvey and the accuracy thereof. In April, 1979, the IBLA affirmed the ALJ. Frank Lujan, 40 IBLA 184 (1979). It was in this setting that Lujan, in June, 1979, instituted the present proceeding wherein he sought review of the IBLA's validation of the 1970 resurvey and a trial de novo to determine the accuracy thereof.

While Lujan's appeal from the federal district court's judgment of dismissal was pending in this Court, Martinez' state court ejectment action against Lujan proceeded to a final deposition. The New Mexico state trial court granted Martinez' motion for summary judgment and enjoined Lujan from entering on to Martinez' land. Martinez v. Lujan, No. 21,677 (San Miguel County Dist.

Ct. Nov. 25, 1980). On appeal, the New Mexico Supreme Court affirmed the summary judgment thus entered in favor of Martinez. Martinez v. Lujan, No. 13,421 (N.M. Oct. 26, 1981). Lujan did not seek review by the United States Supreme Court of the judgment of the New Mexico Supreme Court. It is in this posture that we now address the appeal.

By supplimental brief, the government asserts that the doctrine of res judicata precludes further consideration of the present appeal. In this regard, the government states that the only purpose of the proceeding in federal district court was to determine judicially the accuracy of the 1970 resurvey as such might affect the location of the common boundary between the Lujan and Martinez properties. That particular matter, argues the government, was considered in the ejectment action in state court. The state court ejectment action having now been finally determined, and the location of the

common boundary line between Lujan and Martinez having been forever fixed, the government argues that such renders applicable the doctrine of res judicata. Lujan does not dispute the events which form the basis of the government's res judicata argument. Although res judicata is an affirmative defense and normally must be raised in the trial court, the peculiar facts of this case and the interests of judicial economy suggest that we consider this argument on its merits. See Westwood Chemical Co. v. Kulich, 656 F.2d 1224, 1227-28 (6th Cir. 1981); Boone v. Kurtz, 617 F.2d 435,436 (5th Cir. 1980); Bennett v. Commissioner, 113 F.2d 837 (5th Cir. 1940).

Res judicata is sometimes used interchangeably with the doctrine of collateral estoppel.[4] The doctrine of collateral estoppel precludes relitigation of issues actually litigated and determined in a prior lawsuit. The doctrine may be applied even though the party asserting it was not a party in the

prior case. Parklane Hosiery Co. v. Shore; 439 U.S. 322 (1979); Blonder-Tongue Labs., Inc., v. University of Ill. Foundation, 402 U.S. 313 (1971). Therefore, in this case, the doctrine of collateral estoppel applies even though the defendants herein were not parties to the state court proceedings. The significant fact is that the party against whom estoppel is being asserted, Lujan, was accorded a full and fair opportunity to litigate in the state court proceeding the very issues which he now seeks to relitigate in the federal district court, namely, the accuracy of the 1970 BLM resurvey and the effect thereof, if any, on his common boundary line with Martinez. The location of that common boundary line now has been finally determined by the state court.

It should be noted that in the ejectment proceeding in the state trial court, Martinez established, by affidavits, a prima facie case supporting his ejectment action against

Lujan. Martinez presented the 1954 decree quieting title to the disputed property in Martinez' predecessor-in-interest. He also presented Lujan's disclaimer of any rights to the property. Martinez also produced a private survey, which relied upon the relocated corners set by the BLM in 1970. This private survey supported his claims. It appears from the record that Lujan offered little, or nothing, to controvert the affidavits offered by Martinez. Specifically, Lujan filed no affidavits in support of his assertion in this Court that he had relied upon the pre-1979 boundaries. Further, in the state court proceeding, Lujan did not even plead 43 U.S.C. § 772 by way of defense,[5] nor did he raise as a defense the accuracy of the 1970 resurvey, though he had the opportunity to do so. Hence, this is not an instance, as suggested by counsel, where Lujan never had his day in court. Lujan did have his day in court and, apparently, he slept on whatever rights he had.

[1]On appeal, Lujan appears to have abandoned his original claim that the APA authorized judicial review of the Secretary's decision in this case. In any event, we have determined previously that the APA is not an independent grant of federal jurisdiction. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980), aff'd on other grounds, 50 U.S.L.W. 4169 (1982). Accord, Califano v. Sanders, 430 U.S. 99, 105-07 (1977).

[2]Because of our dismissal of this appeal, we need not address the merits of the district court's determination that it lacked subject matter jurisdiction under 28 U.S.C. § 1331 (1976).

[3]Although abstention from the exercise of federal jurisdiction is the exception and not the rule, Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 813, (1976); Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir.), cert. denied, 444 U.S. 931 (1979), the Supreme Court has recognized the rule that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. Colorado River Water Conserv. Dist. v. United

States, 424 U.S. at 818; Donovan v. City of Dallas, 377 U.S. 408, 412 (1964).

[4]The terms "res judicata" and "collateral estoppel" apply to related but distinct doctrines. Under res judicata, parties to a final judgment or their privies are barred from bringing further claims based on the same cause of action. Montana v. United States, 440 U.S. 147, 153 (1979); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877). Under collateral estoppel, an actual and necessary determination of an issue by a court of competent jurisdiction is conclusive in subsequent cases based on a different cause of action but involving a party to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). The preclusion issue presented in this matter is more accurately a question of collateral estoppel.

[5]In United States v. Reimann, 504 F.2d 135,138-39 (10th Cir. 1974) and United States v. Doyle, 468 F.2d 633, 636 (10th Cir. 1972), we recognized that language of 43 U.S.C. § 772 prevents a federal resurvey from adversely affecting the established and recognized property rights of private landowners abutting the public lands. The New Mexico Supreme Court

had recognized this principle even earlier. Ward v. Rodriguez, 88 P.2d 277 (N.M.), cert. denied, 307 U.S. 627 (1939). Lujan's failure to rely upon such precedents in the state court proceedings prevents his reliance upon them now. Lujan had an opportunity to present his case of good faith reliance upon the New Mexico Supreme Court. His failure to do so does not prevent the government defendants in this action from asserting collateral estoppel against him.

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ALEXANDER L. STEVAS,
CLERK

No. 82-187

In the Supreme Court of the United States

OCTOBER TERM, 1982

FRANK LUJAN, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
JAMES G. WATT, SECRETARY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE DEPARTMENT OF THE INTERIOR IN OPPOSITION

REX E. LEE
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TABLE OF CONTENTS

	Page
Memorandum	1
Appendix A	1a
Appendix B	5a

TABLE OF AUTHORITIES

Cases:

Mullaney v. *Wilbur*, 421 U.S. 684 3

State Land Board v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 3

Statute:

43 U.S.C. 772 2

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1. In 1970, the Department of the Interior's Bureau of Land Management conducted a dependent resurvey of certain federal land in New Mexico. Near the federal land is land owned by Frank Lujan, the petitioner herein. The government resurvey did not result in any federal claim to land owned by the petitioner, but the relocation of certain section corners resulted in a claim by Michael Martinez, a private landowner adjacent to the petitioner, to certain lands previously claimed by the petitioner.

Petitioner administratively challenged the Department of the Interior's survey. He was eventually held not to have met his burden of establishing by clear and

convincing evidence that the survey was not an accurate retracement and reestablishment of the lines of the original survey. *Frank Lujan*, 40 I.B.L.A. 184 (1979). Petitioner sought judicial review of the administrative decision, but his complaint was dismissed by the district court on the ground that it lacked subject matter jurisdiction. *Frank Lujan* v. *United States Department of the Interior*, No. CIV-79-455C (D.N.M. Feb. 11, 1980) (App. A, *infra.*, 1a–4a). Lujan appealed from this decision.

In the meantime, Martinez brought in the state court an ejectment action against the petitioner, and prevailed. *Martinez* v. *Lujan*, No. 13,521 (N.M. Oct. 26, 1981) (App. B, *infra.*, 5a–8a). Lujan did not petition to this Court for review of the judgment of the New Mexico Supreme Court.

The court of appeals, when it considered this case, recited the foregoing facts, noted that petitioner had been accorded "a full and fair opportunity to litigate in the state court proceeding the very issues which he now seeks to relitigate in the federal district court, namely, the accuracy of the 1970 BLM [*i.e.*, Bureau of Land Management] resurvey and the effect thereof, if any, on his common boundary line with Martinez" (Pet. App. 16-17), and concluded that under the doctrine of collateral estoppel, petitioner could not in the instant suit relitigate the issues actually litigated and determined by the state court.

2. The Department of the Interior does not, by virtue of its dependent resurvey, claim any land owned by petitioner, nor does the Department assert that the resurvey in any way affects the boundary between Lujan and Martinez. Indeed, the law is that no resurvey or retracement of a public land survey may be so executed "as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." 43 U.S.C. 772.

Since the land involved in this boundary dispute is entirely in private ownership, and not subject to any claim by the United States, the principles by which that boundary dispute is to be resolved are to be found in the general body of state property law. *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977). State courts are the ultimate expositors of state law, and this Court has repeatedly held that it is bound by the construction put upon state law by state courts. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). Since the Supreme Court of New Mexico has resolved the matter which is truly in issue here—the dispute between private parties as to the boundaries of their adjacent tracts—no federal question remains for this Court to decide.

To be sure, it may seem that petitioner was caught in a Catch-22-like situation because the State and Federal tribunals unduly deferred to each other. But the fact is that the New Mexico Supreme Court did not decide the boundary question on the ground of the mere existence of the federal administrative decision; rather, that court was persuaded that the I.B.L.A. decision rejecting the challenge to the BLM survey and its location of a certain quarter corner was "well reasoned" (App. B, *infra*, 8a), and it found that petitioner had presented no evidence to indicate that the quarter corner had originally been located elsewhere. *Id.* at 7a–8a. At all events, it was not for the federal district court or court of appeals to interfere with the State court proceedings or to determine whether too much weight was given to the federal survey. Nor is that a proper question for this Court. And, even if the district court might have reviewed the IBLA ruling at the instance of petitioner, no decision by that court, or the court of appeals, or indeed this Court, can affect the final judgment of the New Mexico Supreme Court.

It is respectfully submitted that the court of appeals' ruling was correct, and that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. CIV-79-455 C

Filed Feb. 11, 1980

FRANK LUJAN, PLAINTIFF,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., DEFENDANTS.

MEMORANDUM OPINION

This case is presently before the Court on a Motion by Defendants to Dismiss the Amended Complaint. For the reasons expressed below, that Motion will be granted and the case dismissed.

STATEMENT OF THE CASE. Plaintiff owns land located in San Miguel County, New Mexico. In 1880 an original survey was conducted covering Plaintiff's property. Between June 15 and August 15, 1970, a "dependent resurvey" was conducted by a survey team from the State Office, Bureau of Land Management, Santa Fe, New Mexico. The purpose of the resurvey was to determine the boundaries of public lands to the west of Plaintiff's land. The resurvey reestablished a boundary line between the property of Plaintiff and the property of Michael and Lillie Martinez, which would mean that Plaintiff's land would be made smaller. A brass cap was put in place by the Bureau of Land Management (BLM) in conformity with the dependent resurvey.

In May 1976 the Martinez' filed suit against Plaintiff in State Court, the District Court of San Miguel County, Civil No. 21,677. That suit is an action in ejectment seeking to remove Plaintiff from the now-disputed land. Plaintiff states in his affidavit,

> (i)t is my information and belief that the Plaintiffs in that action intend to rely on the "accuracy" of a presently emplaced B.L.M. brass cap for the north quarter of Section 17, T. 17N., R.24E., N.M.P.M., in order to attempt to prove their allegation that I am unlawfully occupying property which they claim is theirs. The cap and the property are the same caps and property which is in dispute in 40 IBLA 184 (1979).

Affidavit of Frank Lujan, October 23, 1979. That suit is still pending.

A hearing was held in Las Vegas, New Mexico, on November 30 and December 1, 1977, before an administrative law judge of the Office of Hearings and Appeals, Bureau of Land Management. At that hearing, where this Plaintiff challenged BLM's 1970 resurvey, the Martinez' were allowed to intervene. The boundary issue was decided adversely to Plaintiff. *Frank Lujan*, 40 I.B.L.A. 184 (1979).

In this action, Plaintiff seeks *de novo* review of the adverse administrative decision, alleging that as a direct and proximate result of that decision he has suffered and will suffer damages to his property rights. Defendants are the Department of Interior, Secretary Andrus, and the United States.

SUBJECT MATTER JURISDICTION. Plaintiff alleges jurisdiction under the Administrative Procedures Act (APA), 5 U.S.C. Sections 701-706, and 28 U.S.C. Section 1331 (federal question). He alleges no amount in controversy, but Section 1331 was recently amended to

remove the $10,000.00 amount in controversy requirement in any action brought against the United States, its agencies and officers.

The Court notes that the APA does not contain a direct jurisdictional grant. There was a conflict in the Circuit Courts of the United States as to whether the APA should be read as containing an implied grant of jurisdiction to the district courts to hear any and all appeals of administrative decisions. That conflict has recently been resolved by the Supreme Court. It held

> (T)he better view is that the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions.

Califano v. *Sanders*, 430 U.S. 99, 105 (1977).

Thus, jurisdiction must depend upon whether there is a "federal question" raised by the complaint. I find there is none. The gravamen of the complaint is title to real estate located in New Mexico. That issue can only be litigated in the State courts, and, in fact, is presently the subject of the ejectment action mentioned above. No federal question has been pointed out by Plaintiff, except for an argument in his brief that the complaint raises "several issues regarding violations of Plaintiff's rights as secured by the Constitution, statutes and law." Plaintiff's Brief at p.2, October 26, 1979. The resurvey was conducted pursuant to a manual of the Department of Interior, Manual of Instructions for the Resurvey of the Public Lands of the United States, Section 400 (1947). No statute has been cited to the Court, however, which authorizes or requires the survey activity complained of.

Further, no provision of the Constitution has been pointed out by Plaintiff which would provide the basis for this action. He has not alleged a due process violation involving his property rights, nor could such an allegation withstand muster. He does not maintain that

the resurvey done in 1970 has had any direct effect on his property rights. The most he alleges is that the Martinez' intend to rely on the resurvey in their ejectment action. While that may be the case, the Court here is asked to set aside the administrative decision of 1979. That decision would, of course, be hearsay in the ejectment action. The 1970 resurvey itself would at most be "mere evidence" as to the accuracy of the boundary it appears to reestablish between the properties of Plaintiff and the Martinez'. *Ben Realty Co.* v. *Gothberg*, 56 Wyo. 294, 109 P.2d 455 (1941). And the manual referred to above even states, "...the resurvey cannot affect the rights of owners situated outside of the boundaries of public lands." Manual Section 646. *See, also, Ben Realty Co.* v. *Gothberg, supra; United States* v. *State Investment Co.*, 264 U.S. 206 (1924). Thus, absent federal action amounting to deprivation of Plaintiff's property rights, no federal question is presented here.

Even if this Court had subject matter jurisdiction over this Complaint, I would probably refrain from hearing the case and instead defer to the state court action filed previous to this action. There, the issue of the validity of the 1970 resurvey will be fully litigated, and an action here would merely be duplicative.

An order of dismissal will be filed in accordance with the opinions expressed.

/s/SANTIAGO E. CAMPOS
United States District Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 13,521

Filed Oct. 26, 1981

MICHAEL MARTINEZ AND
LILLIE M. MARTINEZ, HIS WIFE,
PLAINTIFFS-APPELLEES,

v.

FRANK LUJAN AND
CIPRIANO LUJAN, HIS SON, DEFENDANTS-APPELLANTS.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY

DECISION

FEDERICI, Justice.

Appeal is from the District Court of San Miguel County. Plaintiffs (appellees) sought to eject defendants (appellants) from land claimed by plaintiffs. The trial court entered summary judgment for plaintiffs. Defendants appeal. We affirm.

Appellees seek to eject appellants from a portion of land deeded to appellees, described as follows:

> The SE 1/4 of SW 1/4 of Section 8, and the NE 1/4 of NW 1/4 of Section 17, in Township 17 North of Range 24 East of the New Mexico Meridian, excepting therefrom one vara of land bounded as follows: on the north by land formerly of Cipriano Lujan, on the south by land formerly of Cipriano Lujan, on the east by land formerly of the public domain and on the west by the river and being the same land conveyed to Cipriano Lujan on March 25, 1926 by Gregorio Gallegos and Rafaelita Chavez de Gallegos, his wife, and Carlota Estrada

by their deed recorded in Book 96, page 138 of the Spanish Deed Records of San Miguel County, New Mexico.

The chain of title shows that Manuel D. Gallegos quieted title to the land described above in 1954. Manuel Gallegos conveyed to Meliton Gallegos, et ux., who transferred the same land to appellees. The deed to appellees contains the description set forth above. Appellants claim to be the successors in interest to a parcel of land described as "one vara", being a part of the land described in the deed.

In order to determine from which land appellants were to be ejected, appellees employed a surveyor to prepare a survey of their lands, here referred to as the Garcia-Marquez survey. Meanwhile, appellants had been involved in seeking federal administrative and judicial relief in an effort to show that a 1970 government resurvey incorrectly placed a brass cap upon which the Garcia-Marquez survey relied. Appellants have exhausted their federal administrative appeals, all of which have been decided against them. On appeal to the Federal District Court, the court found that there was no federal question involved and that the issue concerning the resurvey should be litigated in state court.

Appellees' had made a prima facie case consisting basically of the following: (1) a deed describing appellees' land; (2) the Garcia-Marquez survey showing the parameters of the land described in the deed; (3) a legal opinion signed by Administrative Law Judge Honorable Douglas E. Enriquez, which concluded that a brass cap, upon which the Garcia-Marquez survey relied, was correctly placed following a federal resurvey in 1970. Once appellees have made a prima facie showing that they were entitled to summary judgment, the burden shifted to appellants to show that there was a genuine factual

issue and that appellees were not entitled as a matter of law to summary judgment. *Goodman* v. *Brock*, 83 N.M. 789, 498 P.2d 676 (1976).

Appellants claim that summary judgment was incorrectly granted by the trial judge and that issues of fact remain in this case for the following reasons: (1) Since the Garcia-Marquez survey includes lands described in appellees' deed, it must be established whether the survey includes the one vara excepted in the deed; (2) there is a discrepancy in the number of acres described in appellees' deed and the number of acres described in the Garcia-Marquez survey, in that the deed describes about 58 acres, while the survey describes about 74 acres (this discrepancy, appellants contend, supports their view that the Garcia-Marquez survey includes the "one vara" described in appellees' deed); (3) the trial court did not adequately consider the fact that appellants were cultivating the land in issue at the time appellees acquired the deed; (4) the proper location of the brass cap indicating the quarter corner upon which the Garcia-Marquez survey is based, is yet to be determined, and although the federal administrative law court found that appellants have not proved their case by clear and convincing evidence, it did indicate that doubts remain as to the proper location of the brass cap.

Summary judgment is properly granted where proof in favor of the motion is not controverted by the party opposing the motion. *Goodman* v. *Brock*, *supra*.

Appellants' claim that an issue of fact remains in this case is without merit. Although appellees' deed contains an exception of the one vara to which appellants lay claim, appellants have presented no documents, affidavits or other evidence that the land from which appellees seek to eject appellants is the one vara mentioned in the deed. The Garcia-Marquez survey shows that appellants have been in possession of considerably

more than one vara of land. Appellants have not presented a survey of their own; they have not argued adverse possession; they have presented no documents showing color of title, nor have they shown that they have paid taxes on the one vara in dispute.

An important exhibit considered by the trial judge was the written opinion of the federal administrative law judge. Although there may be some question as to the admissibility of the opinion, the issue was not raised below by appellants. The administrative court opinion was well reasoned and concluded that the brass cap upon which the Garcia-Marquez survey was based was properly determined by a federal resurvey conducted in 1970.

Appellants have not met their burden of showing that a genuine factual issue remains in this case.

The trial court is affirmed.

This decision is not to be published nor cited as precedent.

IT IS SO ORDERED.

/s/ WILLIAM R. FEDERICI
WILLIAM R. FEDERICI, *Justice*

WE CONCUR:

/s/ DAN SOSA, JR.
DAN SOSA, JR., *Senior Justice*

/s/ H. VERN PAYNE
H. VERN PAYNE, *Justice*